

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OZBURN-HESSEY LOGISTICS, LLC	)	Cases: 26-CA-092192
	)	15-CA-097046
and	)	15-CA-105527
	)	15-CA-106387
UNITED STEELWORKERS UNION	)	15-CA-106511
	)	15-CA-109235
and	)	15-CA-111520
	)	15-CA-111523
LAUREN KEELE, an Individual	)	15-CA-111581
	)	15-CA-117208
and	)	15-CA-119925
	)	15-CA-119826
STACEY WILLIAMS, an Individual	)	15-CA-123315
	)	15-CA-106180
	)	15-CA-108749

**RESPONDENT OZBURN-HESSEY LOGISTICS, LLC'S
MOTION FOR RECONSIDERATION OF DECISION AND ORDER**

Pursuant to Section 102.48 of the Regulations of the National Labor Relations Board ("the Board"), Respondent Ozburn-Hessey Logistics, LLC ("OHL") respectfully moves for reconsideration of the three-member panel's Decision and Order in this matter, issued on August 27, 2018. OHL was granted an extension of time to file this motion to October 8, 2018, and thus the motion is timely filed.

I. Introduction

OHL recognizes that a motion for reconsideration requires "extraordinary circumstances." Thus, OHL asks the Board to reconsider only a few portions of its Decision and Order ("the Decision").¹ OHL intends to petition an appropriate Court of Appeals to review any

¹ The term "the Decision" will refer to the two-member majority, except where noted otherwise.

and all of the findings in the decision, but OHL has identified material errors and moves for reconsideration in connection with only the following findings in the Decision:

1. The discharge of Shawn Wade violated Section 8(a)(3) of the Act.
2. The termination of Nanette French violated Section 8(a)(3) of the Act.
3. The termination of Jerry Smith, Sr. violated Sections 8(a)(3) and 8(a)(4) of the Act.
4. The termination of Stacey Williams violated Section 8(a)(3) of the Act.
5. The discharge of Lauren Keele violated Section 8(a)(5) of the Act.
6. The imposition of the additional "enhanced remedies". Because the Board acted *sua sponte* in adding additional "enhanced remedies" that were not imposed by the Administrative Law Judge ("ALJ"), requested by the General Counsel, or briefed by any party, effective review of these additional enhanced remedies requires a request for reconsideration by the Board. See *HTH Corp. v. NLRB*, 823 F.3d 668, 672 (D.C. Cir. 2016)

II. Shawn Wade [Decision, pp. 5-7]

The finding that Wade's discharge violated Section 8(a)(3) hinged preliminarily on whether the General Counsel successfully established that a single senior manager of OHL (Randall Coleman) was aware that Wade had signed a union card, purportedly establishing OHL's "knowledge" that Wade was engaged in protected concerted activity. Because this finding appears to be contrary to the ALJ's factual findings, based on credibility determinations, or that the Decision overlooks some factual findings, OHL respectfully submits the reconsideration of the ALJ's findings is warranted. In regard to the issue of "knowledge", that issue, the ALJ made the following credibility determinations:

1. The ALJ did not credit Wade's testimony that he made eye contact with Coleman by way of the rearview mirror in Coleman's car. (ALJD:48)²
2. The ALJ did not credit Wade's testimony that he could see Coleman's eyes in Coleman's rearview mirror. (Id.)

² "ALJD" refers to the page of the ALJ's decision appended to the Decision and Order.

3. The ALJ credited Coleman's testimony that he did not make eye contact with Wade. (Id.)

4. The ALJ credited Coleman's testimony that he did not look directly at Wade and Anita Wells while Wade was supposedly filling out a union card. (Id.)

5. The ALJ further held that the record did not establish that Wade was active in the union organizing campaign, noting further that Wade testified that he did not wear union-related attire. (ALJD:47)

6. From Coleman's vantage point within his car, he could not easily have discerned that Wade was filling out a union card. (ALJD:48)

7. The ALJ further found General Counsel's arguments to be based on speculation, and not evidence, and therefore General Counsel had failed to meet its initial burden to show that OHL was aware of Wade's protected activities through Mr. Coleman. (Id.)

Notwithstanding the Board's long-standing adherence to *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951), the Decision appears to overlook or contradict many of the ALJ's credibility determinations without explanation. For example, the Decision erroneously recites that "the judge credited Wade's testimony that Coleman saw him." (Decision, p. 6). This is not accurate. The ALJ found that Coleman "likely saw Wade", but not based on crediting Wade's testimony. (ALJD:48) In fact, the ALJ credited almost none of Wade's testimony. And the Decision fails to address Coleman's un rebutted testimony that he did not know who Wade was. (Tr. 1945).³ But even if he knew Wade, it would not establish that he recognized Wade on the day in question, or that Coleman was aware that Wade was signing a union card.

The logic employed by the Board to overrule the ALJ on Coleman's knowledge of Wade's union activity is unwarranted and constitutes material error within the meaning of Board Rule 102.48(c). Logically and legally, facts may be established through circumstantial evidence, and inferences may be drawn from facts. But the Decision makes an illogical leap by drawing

³ "Tr." refers to pages in the Transcript of the hearing before the ALJ.

inferences from circumstantial evidence, while failing to establish any "facts" by a preponderance of the evidence. Such a leap is certainly not authorized by *Montgomery Ward & Company*, 316 NLRB 1248 (1995), *enfd.* 97 F.3d 1448 (4th Cir. 1996), cited by the Decision. Although *Montgomery Ward* has the language cited by the Decision, the evidence was much stronger in *Montgomery Ward* that the Employer knew of the union activity of the alleged 8(a)(3) discriminatees, who had "openly solicited" union participation. (316 NLRB at 1254). And perhaps most importantly, the ALJ in *Montgomery Ward* made a factual finding that the proffered reasons for discharging the 8(a)(3) discriminatees were "pretextual". No such finding was made nor warranted here. The record in this case falls far short of the "confluence of circumstances" relied upon in *Montgomery Ward*. (316 NLRB at 1255).

Thus, the Decision erroneously concludes "that circumstantial evidence supports an inference, which we draw, that the Respondent knew of Wade's union activity." (Decision, p. 6) In other words, notwithstanding the ALJ's unchallenged credibility determinations, the Decision "infers" that Coleman knew of Wade's union activity. One inference is stacked on top of another based solely on what the Decision refers to as "circumstantial evidence". The Decision states that "the Respondent" had witnessed union activity following the election results, but makes no effort to connect Mr. Coleman to that witnessing. Another purported piece of "circumstantial evidence" relied upon by the Decision was that one manager (not Coleman) had seen Wade with Wells in the parking lot. Finally, Wade was discharged for stealing time, without the slightest bit of evidence that Mr. Coleman was at all involved in that discharge decision. In fact, Shannon Miles and Lisa Johnson (the OHL Human Resources personnel involved in Wade's termination) testified without contradiction that neither of them spoke with

Coleman about Wade or employees in the parking lot. (Tr. 2362, 2672) But despite that, the Decision "infers" that Coleman knew of Wade's activities.

The Decision, in addition to relying on *Montgomery Ward & Company* cites *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182 (2011) to support the proposition that "union animus may be inferred from circumstantial evidence." But *Camaco* does not support the Board's leaps of logic in this matter. In *Camaco*, the ALJ found that the alleged discriminatee had engaged in union activity and that the Respondent knew of that activity, and no exceptions were taken to those findings. 356 NLRB at 1185. The ALJ in the instant case made opposite findings.

The ALJ's credibility findings should end the inquiry because there is simply no proof that Coleman knew of Wade's union activity. The Decision's unsupported assumption to the contrary is simply inconsistent with *Standard Dry Wall Products*.

The Decision went on the hold that another "inference" can be drawn from OHL's alleged disparate treatment of Wade in connection with his stealing time. OHL may raise that erroneous finding with an appropriate court of appeals, but for purposes of this motion for reconsideration, the Board should reverse its decision on Wade based on the failure of General Counsel to show that OHL was aware of Wade's union activity.

III. Nanette French [Decision, pp. 7-8; Dissent, pp. 16-17]⁴

The Decision commits material error in implicitly abandoning the ALJ's credibility determinations and concluding that Nanette French was unlawfully terminated. OHL again respectfully suggests that reconsideration is warranted in view of the ALJ's credibility findings, such as:

⁴ "Dissent" refers to Chairman Ring's partial dissent.

1. The ALJ's conclusion that Manager Bonner's testimony was more credible than French's, and his crediting Bonner's denial that she saw French distributing union cards. (ALJD:58)

2. Because of the ALJ's "concerns" about French's testimony, he further concluded that the credible evidence did not establish that Supervisor Goodloe saw French when she was passing out union cards. (Id.)

3. The ALJ further credited the testimony of Manager Bonner that she had posted a sign instructing employees to use another door in case of a malfunction, and the ALJ rejected French's testimony that there was never such a sign. (Id.)

4. The ALJ also rejected French's testimony that employees "never got points for returning late from lunch", as being beyond the scope of her personal knowledge. (Id.)

5. The documentary evidence disputed the General Counsel's argument of disparate enforcement. (ALJD:58-59)

The ALJ observed that, although there was evidence of animus sufficient under *Wright Line*, he concluded there was no credited evidence that OHL knew that French had engaged in protected activities. (ALJD:59). In addition to crediting Bonner's testimony as to lack of knowledge of protected activity, the ALJ implicitly credited the testimony of Shannon Miles (Tr. 2671) and Lisa Johnson (Tr. 2344-2345), the other two managers involved in the termination of French, that they were unaware of her union activities. Thus, the ALJ concluded that "the General Counsel has not proven that protected activity was a substantial or motivating factor in the decision to discharge French." (ALJD:59)

But the Decision's application of the *Wright Line* analysis is novel and unsubstantiated. Again, rejecting the credibility determinations by the ALJ, the Decision nevertheless tasks OHL with knowledge of French's union activity. It is simply illogical to stack inferences one on the other based on circumstantial evidence. For example, the Decision concludes that OHL's knowledge that there was union activity occurring in the Yazaki parking lot on May 14 necessarily means OHL had knowledge specific to French's union activity. The logic advanced by the Decision would result in OHL having been found to have knowledge of union activity of

any employee that it disciplined in the Yazaki account for some unspecified period of time after May 14. There is no legal support for this supposition. *See Gruma Corp.*, 350 NLR.B. 336, 338 (NLR.B. July 27, 2007) (reversing finding of 8(a)(3) discharge where employer had general knowledge of union activity but did not have knowledge specific to the employee); *Amber Food, Inc.*, 338 NLR.B. 712, 714 (NLR.B. 2002) (same). Nor does *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126 (2015), support the Decision. In *Coastal*, there was "substantial evidence of union-related animus directed specifically at [alleged discriminatees]". (362 NLRB at 2). Such evidence does not exist here.

Further, the Decision makes conclusions concerning disparate treatment without any findings on that issue by the ALJ, and even relies on a previous OHL case listing examples of the attendance records of other employees. There is no analysis in the Board's decision concerning the actual comparability of the alleged comparables. The Decision conspicuously overlooks the example of Lauren Keele, an admitted union opponent, who was terminated for the very same reason as Ms. French in this case. In doing so, the Decision commits material error.

Chairman Ring's dissent more correctly respects the ALJ's credibility findings. The facts belie the Decision's "inference" of OHL's knowledge of French's union activity and disparate treatment of her.

OHL respectfully suggests that a reconsideration of the facts would lead to the conclusion that the decision of the ALJ should be affirmed.

IV. Jerry Smith, Sr. [Decision, pp. 8-9; Dissent, pp. 18-19]

The Decision commits material error in concluding that Jerry Smith, Sr.⁵ was unlawfully discharged for lying during a company investigation of violations of the policy forbidding leaving the building (without permission) after clocking in. Clearly, the ALJ found Smith not to be a

⁵ As the Decision correctly points out, the ALJ referred to Smith, Sr. as "Smith III". (Decision, p. 2, note 7)

credible witness, and the Decision gives no reasons for rejecting the ALJ's credibility determinations. OHL again respectfully requests reconsideration in view of the ALJ's findings.

In particular, the ALJ made the following credibility determinations:

1. Smith's attempted explanation to explain his false answers in response to a questionnaire was "not particularly convincing." (ALJD:73)

2. Manager Wright and Supervisor Maxey credibly testified that they did not limit their caution to employees about leaving the building to only going back to the employee's car. (Id.)

3. Manager Wright correctly referred to an unexcused absence and leaving the building as a "theft of time." (Id.)

4. Smith's testimony that he had permission to leave the building from Supervisor Maxey was completely refuted with proof that Maxey was not present on the day in question. (Id.)

5. Manager Wright's testimony that Smith was not fired for violating the rule about leaving the warehouse after clocking in, but rather was fired because he lied in answering the questionnaire is consistent with the discharge notice. (ALJD:74)

6. OHL's investigation of the incident was not perfunctory and does not justify any inference of pretext. (Id.)

7. When asked about leaving the building after clocking in on September 18, Smith's answer was "clear and unequivocal", and also "false". (Id.)

8. Most importantly, the ALJ found as a fact that "the protected activities of Smith [Sr.] were not, in fact, a substantial or motivating factor in Respondent's decision to discharge him." (ALJD:75)

In addition, the ALJ carefully and thoroughly supported the basis of his factual findings resulting from his credibility determinations which must be accorded deference under *Standard Drywall Products*.

Thus, based on credibility determinations, the ALJ found that the General Counsel met its "initial" burden under *Wright Line*, but the ALJ correctly reasoned that this is a merely "rebuttable" inference or presumption that protected activity was a "substantial or motivating factor" in the decision to discharge Smith. The ALJ correctly concluded that the record

containing the credited testimony rebutted any presumption that protected activity was a substantial or motivating factor. Even if *Wright Line* creates an irrebuttable presumption, with the only defense for the company being that it would have taken the same action in the absence of union activity, the ALJ concluded that the Respondent had carried its rebuttal burden. (ALJD:75).

In a footnote, the Decision accuses the ALJ of "mischaracterizing" the General Counsel's initial burden under *Wright Line* (Decision, p. 8, note 12), but in fact the ALJ's interpretation of *Wright Line* was correct. General Counsel's "initial burden" is one of production because the "initial" showing does not constitute proof of a violation of the statute. Nevertheless, the Decision cannot and does not deny that Smith had lied on a questionnaire during the course of the investigation. The Decision's rejection of the ALJ's analysis is unfounded. The credited evidence convinced the ALJ that, notwithstanding the fact that General Counsel met its "initial burden" under *Wright Line*, any protected activity engaged in by Smith was not the motivating factor behind his discharge. This is a factual finding which the Decision did not and could not challenge.

One important facet of the Decision's analysis which merits reconsideration is the Decision's comment that OHL already had "indisputable video evidence" that Smith had left the building, suggesting that use of the questionnaire was a "pretext" to terminate Smith. (Decision, pp. 8-9) OHL respectfully suggests that the Decision overlooks that, although OHL did have "indisputable video evidence" that Smith had left the building, the video of course could not reveal whether employees leaving the building had received a supervisor's permission to do so. (ALJD:72) This lack of knowledge, coupled with the fact that at least 9 employees received the same questionnaire (Id.) disputes that the questionnaire was a "set up" aimed at Smith.

Most disturbing in the Decision's rejection of the ALJ's findings is the apparent reliance on the fact that OHL had previously discharged Smith and that he was the "union's primary organizer". Without citing any precedent, the Board then concludes that it is a permissible "inferential leap" that OHL acted out of pretext. This is completely contrary to the ALJ's findings based on the evidence that he credited.

The Decision's reliance on *Alternative Energy Applications*, 361 NLRB 1203 (2014) as purportedly increasing the "rebuttal burden" of OHL is misplaced. *Alternative Energy Applications* makes no changes to the allocations and burdens of proof set forth in *Wright Line*. In addition, the reasons asserted by the Employer in *Alternative Energy Applications* for discharging the 8(a)(3) discriminatee were vague and basically unsubstantiated -- "bad attitude and a poor work ethic." (361 NLRB at 1207). But in the instant case, the ALJ found that Smith lied in an investigation, and that OHL has a strong and legitimate interest in protecting the integrity of its investigations -- principles with which the Decision did not disagree. (Decision, p. 8). Thus, there was no justification to heighten OHL's rebuttal burden.

And in concluding that OHL did not sustain its *Wright Line* defense burden, the Decision cites OHL's "widespread use of questionnaires, its failure to identify any other instance in which it has disciplined or discharged an employer for an untruthful answer, and evidence of at least one instance where the Respondent knew an employee had lied on a questionnaire and did not impose discipline." (Decision, p. 9). Chairman Ring is clearly correct in dissenting from this conclusion, correctly summarizing the credited evidence thusly (Decision, pp. 18-19):

1. Smith was on a lawfully imposed final warning.
2. Smith gave demonstrably false answers during the investigation.
3. Smith was not treated disparately.
4. Smith was the only one of the nine employees who received questionnaires who lied about leaving the building during work time.
5. The failure to discipline Jennifer Smith (relied upon by the majority as evidence of disparate treatment) was not a comparable situation due to the different quantum of evidence that she had lied.

Chairman Ring is correct in his analysis and recitation of the credited evidence that OHL carried its *Wright Line* burden. The ALJ's conclusion that OHL did not violate Sections 8(a)(3) and (a)(4) in terminating Smith should be affirmed.

V. Stacey Williams [Decision, p. 5; Dissent, pp. 17-18]

The Decision's analysis of the Stacey Williams termination displays a "material error" meriting reconsideration. Consistent with *Standard Drywall Products*, OHL will not quibble with most of the credibility findings of the ALJ. The problem with the Decision's affirming the ALJ's finding that Stacey Williams' termination violated the Act stems not so much from the recitation of facts, but from the legal analysis erroneously applied by the ALJ and the Decision. As Chairman Ring's dissent points out, *Atlantic Steel Company*, 245 NLRB 814 (1979), does not provide the correct analytical framework here. *Atlantic Steel* applies when there is no dispute concerning the employer's motive; that is, the employer's motive was to discipline an employee for protected activity. In this situation, however, the motivation for Williams' discharge is much disputed, with the issue properly cast by General Counsel's allegation that Williams was discharged for requesting a union representative, while OHL contends that Williams was discharged for insubordination. As Chairman Ring correctly points out, the discharge of Stacey

Williams must be judged under the burden-shifting framework articulated in *Wright Line* and the Decision's failure to apply *Wright Line* was a material error.

The ALJ alternatively analyzed the case under *Wright Line*, but the Decision found it unnecessary to pass on this alternative analysis. (Decision, p. 5, note 23) The ALJ's *Wright Line* analysis can only be characterized as perfunctory. It is also premised on the Respondent's "history of unfair labor practices directed against the Charging Party union". (ALJD:65) It is simply unjust to shade the *Wright Line* analysis against either a union or an employer in a subsequent and particularized issue of motivation based on the history of unlawful action. Each case should be judged on its own merits. Using the *Wright Line* analysis, the ALJ had concluded that "[t]he record does not establish that other employees have been discharged for similar conduct." (ALJD:65) But the General Counsel produced absolutely no evidence that OHL had faced this type of conduct in the past. It is illogical to forbid an employer from taking disciplinary action against an employee on the ground that it has never encountered such misconduct before.

OHL respectfully submits that the Decision's analysis that Williams was engaged in "concerted protected activity" constitutes material error meriting reconsideration. According to the Decision, Williams' requesting union representation was the requisite protected concerted activity. (Decision, p. 5). But at the same time, the Decision does not dispute that he was not entitled to union representation at a meeting solely for administering discipline. The Decision reasoned that "a reasonable, but mistaken belief in rights under a collective bargaining agreement does not eliminate the protected nature of an employee claim." (Decision, p. 5, note 21). But the Decision does not reveal any analysis whether Williams had a "reasonable and

honest belief" that he was entitled to union representation, as required by the case cited in the Decision, *Omni Commercial Lighting*, 364 NLRB No. 54, p. 3 (2016)

In any event, as Chairman Ring further points out, even crediting the testimony which was credited by the ALJ, Williams was clearly insubordinate. The reason for his discharge was insubordination, and there is no question that he was insubordinate. The fact that he was not "loud and disruptive", as emphasized by the Decision, does not change the fact that he was insubordinate by refusing to follow repeated instructions to return to the conference room. He was asked to return to the conference room at least twice, and he failed to comply. These are undisputed facts. And as Chairman Ring further points out, the Respondent has disciplined other employees for insubordination.

Therefore, because of material errors in the Decision's analysis, the holding that Stacey Williams was terminated in violation of Section 8(a)(3) should be reconsidered.

VI. Lauren Keele and the Kronos timeclock [Decision, pp. 9-10; Dissent, p. 19]

There is no allegation that Lauren Keele was terminated in violation of Section 8(a)(3). It is undisputed that she was terminated for excessive absenteeism (including tardiness) pursuant to a well-known and strictly enforced attendance policy. This is not in dispute.

Discussion of Ms. Keele's termination, however, comes in context with the 8(a)(5) allegation that the implementation of the "Kronos" timekeeping system resulted in the implementation of a "material, substantial, and significant" change in working conditions without notice and opportunity to bargain by the union.

The ALJ made very careful findings concerning the Kronos system. He concluded after this intensive inquiry that the implementation of the Kronos system did not represent a "material, substantial, and significant change to employees' terms and conditions of employment". For the reasons pointed out by Chairman Ring in his dissent, this conclusion by

the ALJ is clearly correct. As Chairman Ring further points out in his dissent, there was no evidence that Kronos caused any lasting change in the employees' work. (Dissent, p. 19) But the Decision sweeps all these careful findings away, under an apparent finding (without reference to the record) that the "Kronos system was significantly more complicated than the Unitime [former] system." (Decision, p. 10) This is simply contrary to the ALJ's careful findings based on the evidence at the trial.

The Decision simply, without warrant, substituted its judgment for that of the ALJ on whether the change to Kronos was material, substantial, and significant. The General Counsel, as correctly pointed out by the ALJ, simply did not meet the burden of showing that the implementation of Kronos was a material, substantial, and significant change to the way OHL employees clock in and clock out.

The Decision shows a remarkable lack of confidence in OHL's employees' ability to deal with 21st century technology. The Decision laments that Kronos requires use of a "touchscreen", rather than "physical buttons" under the previous system. It is laughable to think that today's employees would find this challenging in this age of touchscreen cell phones, touchscreen I-pads, touchscreen appliance and entertainment systems, and all the other communication and entertainment technologies. Nor does the fact that Kronos comes with a 50-page instruction manual say anything about whether the use of the Kronos systems represented the required "material, substantial, and significant change". And there was no testimony by any witness that a close reading of this 50-page instruction manual was required in order to use its functionality to clock in and clock out. As Chairman Ring's dissent correctly points out, the ALJ used an apt analogy to an employer buying a new forklift with unfamiliar controls. The ALJ's and Chairman Ring's reliance on *Rustcraft Broadcasting of New York, Inc.*,

225 NLRB 327 (1976) is correct. (Dissent, p. 19) *Rustcraft Broadcasting* is the pertinent precedent because -- at least as far as Lauren Keele is concerned -- the "clock-in" procedure is all that matters.

The Decision simply overlooked undisputed evidence. For example, in order to clock in, both Kronos and Unitime required employees to push an "In" button and to swipe their badge. (Tr. p. 1141) Both Kronos and Unitime contain multiple buttons, one of which is used to clock in at any particular time. (Id.) The buttons on the Kronos clock are actually larger than the buttons on the Unitime clock. (Id.) The only difference between Kronos and Unitime with respect to how employees clock in is that Kronos has a touchscreen, while Unitime had plastic buttons. (Id.) Again, these differences were hardly "material, substantial, and significant."

In addition to overlooking material facts, the Decision commits a material error concerning a critical factor -- "causation". In order to sustain any remedy of reinstatement for Keele, the General Counsel must show that the change to the Kronos system "caused" Keele's termination. *See Essex Valley Visiting Nurses Ass'n*, 343 NLRB. 817, 820 (NLRB. 2004) (dismissing 8(a)(5) allegation where there was "no causal nexus" between the unilateral change and the discharge). But the Decision glossed over this point. The Kronos change in time clock did not cause Ms. Keele to be tardy, and it did not cause her termination.

Lauren Keele was not terminated because OHL implemented the Kronos system. She was terminated for her abysmal attendance record. OHL maintains a well-known and consistently enforced attendance point system. An employee can accumulate up to 12 points based on absences or tardies, with progressive discipline being employed and the ability to remove points after demonstrating good attendance. As of April 30, 2013, Keele had accumulated a dangerously high number of points (12), and had received the necessary

counselings and warnings under the progressive attendance system. (ALJD:84-85). Another point would result in termination.

On the day when she earned her last point, she was late in returning to lunch. She obviously was in a hurry because she knew she was on the cusp of earning a fatal point for tardiness, and she pressed the wrong "button" on the Kronos clock's touchscreen. By the time she corrected her mistake, she was one minute late, and was subsequently fired "purportedly" (the Decision's word) for accrued attendance points. (ALJD:85) OHL does not understand why the Decision uses the word "purportedly", as there is no doubt that she was fired for the accrued attendance points, and there is no allegation that any other factor caused her discharge. In any event, the Decision concludes: "This would not have occurred with the Unitime clock." (Decision, p. 10)

This is pure speculation on the part of the Decision. In her hurry to avoid receiving a point, she could just as easily have pushed the wrong "button" on the previous Unitime clock.

In connection with Ms. Keele's termination, the only function of the Kronos system that is relevant is the procedure for clocking in and clocking out. This has nothing to do with a "50-page instruction manual" for the use of Kronos for other functions, such as the administration of Paid Time Off ("PTO"). There simply is no evidence in this record to show that the change to the Kronos system caused Ms. Keele's discharge. In fact, Ms. Keele admitted in cross-examination that she could have pressed the wrong button on the Unitime clock. (Tr. 1144) Ms. Keele also testified that she had successfully clocked in or out with the Kronos clock at least 20 times before the day when she hit the wrong button. (Tr. 1143-44) It was Ms. Keele's cutting it close at the time clock, as well as her hitting the wrong button, that caused her to be late, and not the Kronos system. After the implementation of the Kronos system, the manner by which

employees clock in and clock out was exactly the same: punch a button and swipe a card. There was simply no difference, and certainly not one that was material, substantial, and significant. And even if there were a change, it did not cause Keele's termination.

Therefore, the Order to reinstate Ms. Keele should be reconsidered in view of the Decision's material error concerning "causation".

VII. Additional Enhanced Remedies

Although OHL disagrees with some of the findings of the ALJ, and disagrees that any remedy is justified in this proceeding, OHL notes that the remedies already ordered by the ALJ include some "additional remedies" beyond the typical remedial order. For example, the ALJ granted General Counsel's requested requirement that the notice to employees be read to the employees during working time. Furthermore, the ALJ required that a union representative, upon request, be allowed to attend the notice reading and to audio-video record it so that it may be reviewed by employees who are not present at the reading. The rest of the ALJ's remedy contains the traditional notice, reinstatement, and make whole provisions. The ALJ also granted General Counsel's request for an order requiring the Respondent to bargain in good faith with the union in connection with the unilateral changes, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962). General Counsel sought no additional "enhanced remedies", notwithstanding the fact that OHL and General Counsel have been litigating charges of unfair labor practices since 2010. The additional "enhanced remedies" ordered by the Decision and Order and challenged here by OHL are:

1. An extended notice period of three years;
2. Publication of the notice in two publications of broad circulation and local appeal twice a week for a period of eight weeks;
3. The requirement that each of OHL's supervisors and managers attend at least one reading of the notice and receive a copy of the remedial notice, with a sign-in sheet for

supervisors and managers at each reading of the notice, and furnishing those sign-in sheets to representatives of the Regional Director.

As authority and justification for these enhanced remedies, the majority cites Section 10(c) of the Act and the Board's decision in *HTH Corporation d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014), *enfd. in relevant part*, *HTH Corp. v NLRB*, 823 F. 3d 668 (D.C. Cir. 2016).

OHL does not dispute the legal proposition that the Board's "remedial" powers under Section 10(c) are broad. But OHL also emphasizes the undisputed proposition of law that Congress did not authorize "punitive" remedies in Section 10(c). See *HTH Corp.*, *supra*, 823 F.3d at 680, citing *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009-12 (D.C. Cir. 1998). A § 10(c) remedy must be truly remedial and not punitive. The enhanced remedies imposed *sua sponte* by the amended remedy order fall across the line from "remedial" to "punitive". As Chairman Ring points out in his dissent, the facts and circumstances of this case are in no way comparable to the actions of the employer in *HTH Corp.* The distinctions (many of which were recognized by Chairman Ring) include:

1. Notwithstanding the vigorously-contested litigation over the past eight years between OHL and General Counsel, no supervisor, manager or responsible official of OHL has ever made disparaging remarks about the Board, General Counsel, the Regional Director, the employees of the Board, any court, administrative judge, or federal judge.

2. OHL has never been accused, much less convicted by contempt, of violating any federal court order.

3. The union's election victory in this matter was razor thin.⁶ OHL exercised its right to remain union free. Now that the election is finally over and the certification approved by the D. C. Circuit Court of Appeals, OHL is bargaining and will continue to bargain in good faith with the union toward a collective bargaining agreement.

4. OHL has not unlawfully interfered in multiple elections.

5. OHL has not unlawfully discharged members of the union bargaining committee.

⁶ The vote was 169 for, and 166 against the union. See *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014).

6. OHL has not promulgated numerous unlawful rules that restricted employees' Section 7 rights.

7. OHL has not bargained in bad faith with the union nor attempted to withdraw recognition of the union.

8. OHL has not asserted frivolous defenses or otherwise exhibited bad faith in the conduct of litigation or actions leading to litigation.

It is easy to characterize the extraordinary enhanced remedies as punitive, because the Board fails to successfully explain how the enhanced remedies are "remedial" of the company's violations of Section 8. For example, the Board justifies enhanced remedies based on the finding that Manager Ken Ball removed union literature from a break room, indicating that OHL has not instructed its managers to comply with Board orders or has not sufficiently impressed upon them the importance of compliance. (Order, p. 13) What the majority overlooks is that Ken Ball was a new manager to OHL, and his removing union literature from a break room was hardly an egregious act.⁷

The requirement that all managers and supervisors attend a reading of the notice cannot be viewed as "educational", but rather meant only to expose them to embarrassment and humiliation. Only a fraction of the total management force at the OHL facility in Memphis have been implicated in any type of alleged unfair labor practices, and treating all supervisors in this matter is unfair to them.

Nor does the majority offer a satisfactory explanation why the usual 60-day notice period is inadequate. Apparently the majority felt that the extended notice period, coupled with the publication in newspapers over an 8-week period, would widen the audience of perspective or former employees. Again, this appears more aimed at embarrassing OHL than in

⁷ The removal occurred in May 2013 (Tr., p. 1880). Bell was hired in January 2013. (Tr., p. 1859)

actually "remediating" any unfair labor practice charges. It is hard to imagine how publicizing the notice remediates offenses that occurred five years ago.

And the majority fails to consider whether reading a notice concerning events occurring over five years ago will help to create a harmonious bargaining relationship between OHL and the union.

Finally, the Amended Remedy section of the Order does not identify any standards for applying the additional enhanced standards. In *Pacific Beach Hotel*, relied upon here, the Board relied on 10(c)'s authority to require "such affirmative action...as will effectuate the policies of th[e] Act." (361 NLRB at 710). The Board recited the need for remedies that are "necessary and appropriate". (Id.) But these are not specific standards. Particularly for the benefit of any reviewing Court of Appeals, and in view of the fact the additional enhanced remedies were not requested by General Counsel or the Charging Parties, nor were they recommended by the ALJ, the Board should entertain reconsideration to enunciate the standards that it applied in imposing the additional enhanced remedies.

Therefore, OHL urges the Board to reconsider these additional enhanced remedies, and whether they are truly effective in any "remedial" way or productive of the current bargaining relationship between OHL and the union. Chairman Ring is correct that the 3-year notice posting and the notice-publication remedy should be reserved for "once-in-a-generation cases" such as *Pacific Beach Hotel*, and the Board does not explain how or why this is such a case. At a minimum, the Board should grant reconsideration to expound upon the standards for additional enhanced remedies.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Motion for Reconsideration has been sent via electronic mail to:

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